

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Crl.App. 763/2007

%
Date of Reserve : 28.10.2009.
Date of Decision: 05.11.2009.

NARESH @ CHHOTU Appellant
! Through: Ms. Saahila Lamba, amicus curiae

Versus

\$ STATE (NCT of DELHI) Respondent
^ Through: Mr. Navin Sharma, APP for state

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

: **MOOL CHAND GARG,J**

1. This order shall dispose of the aforesaid appeal filed against the judgment of conviction and order of sentence dated 16.08.2007 and 20.08.2007 passed by the Additional Sessions Judge, Patiala House, New Delhi in S.C. No.77/2006. The case arose out of FIR No. 492/2005 registered under sections 392/397 IPC at P.S. New Friends Colony. By the impugned judgment Ld. ASJ held the appellant guilty of offences under Section 392/397 IPC and sentenced him to undergo RI for 3 years and to pay a fine of Rs.500/- and in default to undergo further RI for one month under section 392 IPC and RI for 7 years and a fine of Rs. 500/- was also

imposed for the offence committed under Section 397 IPC and in default of payment of fine to further undergo R.I. for one month. Both the sentences were ordered to run concurrently. Benefit of Section 428 of Cr.PC has also been extended to the appellant.

2. Briefly stated the facts giving rise to the present appeal are that on the intervening night of 23rd and 24th September 2005 at about 11.15 PM complainant, namely, Roop Ram while returning to his house at Kalkaji from Mayur Vihar in his TSR No.DL-IRH-0375 when reached near the speed breaker which was at DND flyover, he was signaled by one person to stop his TSR. Thereafter, the appellant put a razor on his neck and asked him to handover whatever he has with him. Appellant then took out Rs.100 note, some papers, photocopy of the challan slips and the visiting cards from the pocket of shirt of the complainant and put them in his rear pant pocket. In the meanwhile a PCR vehicle came to that side. On seeing them the appellant started running. Complainant then raised the alarm and also caught hold of the appellant from behind. On hearing the shout of the complainant, police reached at the spot. H.C Jai Singh and Ct. Chandermani then overpowered the appellant and snatched the razor from him. Then on getting the information, the local police of New Friends Colony also reached there, who then took personal search of the accused and recovered Rs.100 note from the back pocket of his pant, photocopy of the challan slip and three visiting cards were also recovered. They also seized the razor & hundred rupee note.

3. On the statement of complainant made to the police, (ExPW2/A) FIR No. 492/2005 was registered at P.S New Friends Colony under sections 392/397 IPC. After the completion of investigation, the challan was filed by the police in the court of Ld. MM who after complying with the provisions of section 207/208 Cr.P.C committed the case to Sessions Court. Vide order dated 20.03.2006, charges were framed under sections 392/397 IPC to which the appellant pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case has examined 5 witnesses. After closing of the prosecution evidence, statement of the appellant under section 313 Cr.P.C. was also recorded in which he denied the entire evidence. He also stated that he has been called at police station and falsely implicated in this case. The appellant did not lead any defence evidence. Vide impugned judgment Ld. ASJ held the appellant guilty and sentenced him as aforesaid. Hence the present appeal.

5. The Ld. Amicus Curiae, for the appellant, has assailed the judgment of conviction and order on sentence not on merits but has submitted that the appellant is in Jail for 5 years and is entitled to reduction of sentence, since no case is made out against him under section 397 IPC. It is submitted that the pivot of the prosecution story is the evidence of PW2 (Roop Ram) the complainant/ victim in the alleged incident of robbery. It is highly unbelievable that the TSR driver who was returning to his house in late hours of night was only carrying Rs. 100 note in his pocket. It is also submitted that alleged incident is the result of altercation between the

appellant and the complainant when he refused to carry the appellant to Maharani Bagh where he was residing. It is further submitted that the appellant was drunk and TSR driver refused to extend further quarrel with him and in the meantime when PCR van reached there complainant made a verbal complaint on which police worked very harshly and prepared a case against him.

6. It is further submitted by the Amicus Curaie that there was no razor with the appellant at the time of the incident and whatever was shown by the police was planted on him. There was no independent witness of the alleged recovery of the razor, and nobody was joined from public even when the incident took place on the busy road and statement made by the complainant is a tutored one by the police. It is also submitted that there are material discrepancies in the statement of prosecution witnesses and that all the procedural work was done at police station and not at the spot which shows that unlawful procedure was adopted by the police so as to falsely implicate the appellant in this case.

7. The learned amicus curiae has stated that the story of the prosecution about seizure of ustara/razor from the appellant along with sum of Rs. 100 at the time of commission of crime is flimsy and cannot be believed for the reason that there are contradictions in the statement of the witnesses. It is submitted that firstly there is no public witness associated with the recovery of ustara/razor. Secondly, as per the statement made by PW-4 Constable Mohd. Qasim, seizure memo of ustara was prepared at

the spot before registration of FIR and it is only thereafter a rukka was sent to the Police station. Thus, the question of recording the FIR No. on the seizure memo of ustara is not truthful. Moreover, the details of the ustara as given in the seizure memo were not mentioned in the information given by PW-3 Jai Singh, who received information about the incident as in-charge of PCR Van and on which basis DD No. 19-A has been recorded. A perusal of the aforesaid DD and the seizure memo goes to show that there is a difference in the version of the Police inasmuch as while DD No. 19-A only refers to some knife in possession of the accused whereas seizure memo gives details of ustara. The seizure memo also has the FIR No. which could not have been there had the seizure memo would have been prepared at the spot.

8. On the other hand, Id. APP for the State has supported the impugned judgment and submitted that in the present case, appellant put razor on the neck of the complainant, Roop Ram, who was examined as PW2 and has fully supported the prosecution's case. Robbed articles were identified as Ex. P-1 and Razor (Ustra) was identified as Ex. P-2. He also submitted that the complainant raised the alarm and as a matter of chance police vehicle came to the site and the appellant was arrested from the spot and robbed articles and razor (Ustra) were recovered from appellant. Id. APP also submitted that the argument of the defence counsel has been rightly dealt by the Id. ASJ in the impugned judgment and there is no need to deal with them again.

9. Having perused the statement made by PW-4, PW3 and the complainant & document Ex.PW2/A, I am satisfied that there are contradictions in the story of prosecution regarding seizure of ustara/razor from the appellant. Even with regard to the user, I find that while PW2 says that ustara was put on his neck, PW3 says the accused was beating TSR driver and does not say that any robbery had taken place in his presence. He also does not say that by using the razor the robbery was committed. Moreover, the statement of PW3 goes to show that TSR driver i.e. the complainant had caught hold of the appellant from backside. If that was so, the story of user of razor becomes unbelievable. As already stated the statement of PW4 goes to show that seizure memo was prepared before taking a rukka to the Police station. Thus, the mentioning of FIR No. on the seizure memo makes story of the prosecution unbelievable. This view find support from the judgment of a Division Bench of this Court in *Crl.A.No.172/2001* titled as *Pradeep Saini and Anr. Vs. State* decided on 09.09.2009, wherein it is held,

70. Another circumstance which needs to be highlighted is that as per the case of the prosecution the sketch Ex.PW-3/D of the knife purportedly recovered from the possession of accused Kishore Kumar was prepared before the registration of the FIR Ex.PW-2/B. Surprisingly, sketch Ex.PW-3/D of the knife contains the number of the FIR registered in the present case. The prosecution has not offered any explanation whatsoever as to under what circumstances number of the FIR Ex.PW-2/B has appeared on the document, which was allegedly prepared before registration of the FIR. This gives rise to two inferences; either the FIR Ex. PW-2/B was recorded prior to the alleged recovery of the knife or number of the said FIR was inserted in said document after its registration. In both the situations, it seriously reflects upon the veracity of the prosecution version and creates a good deal of doubt

about recovery of the knife in the manner alleged by the prosecution.

10. In these circumstances, the conviction of the appellant under Section 397 IPC cannot be sustained. Accordingly, the conviction and sentence imposed upon the appellant under Section 397 IPC is set aside. However, the conviction and sentence imposed upon the appellant under Section 392 IPC is maintained. The appellant has already undergone sentence awarded to him as he is in jail for more than 5 years. In these circumstances, it is ordered that the appellant be released forthwith in case he is not wanted in any other case.

11. Appeal is disposed of accordingly. A copy of this order be sent to the appellant through Jail Superintendent. TCR, if any, along with a copy of this judgment be sent back forthwith. The fee of amicus curiae is fixed as Rs.4000/-.

MOOL CHAND GARG, J.

NOVEMBER 05, 2009
ag